

05-CV-05827-ORD

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

PAUL ANTHONY TUMA,

Petitioner,

v.

ALICE PAYNE,

Respondent.

Case No. C05-5827RJB

ORDER DENYING CERTIFICATE
OF APPEALABILITY

This matter comes before the court in order to consider whether to grant or deny the petitioner a Certificate of Appealability. *See* 28 U.S.C. 2253(c)(3). Dkt. 31. The court has reviewed the record herein.

PROCEDURAL HISTORY

On May 4, 2006, U.S. Magistrate Judge J. Kelley Arnold issued a Report and Recommendation, concluding that petitioner's habeas claims were time barred and that the petition should be dismissed with prejudice. Dkt. 24. On June 15, 2006, the court adopted the Report and Recommendation and dismissed the petition with prejudice. Dkt. 28. Petitioner has now appealed to the U.S. Court of Appeals for the Ninth Circuit. Dkt. 30.

STANDARD FOR GRANTING A CERTIFICATE OF APPEALABILITY

The district court should grant an application for a Certificate of Appealability only if the

petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(3). To obtain a Certificate of Appealability under 28 U.S.C. § 2253(c), a habeas petitioner must make a showing that reasonable jurists could debate whether, or agree that, the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. *Slack v. McDaniel*, 120 S.Ct. 1595, 1603-04 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). When the court denies a claim on procedural grounds, the petitioner must show that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 120 S.Ct. at 1604.

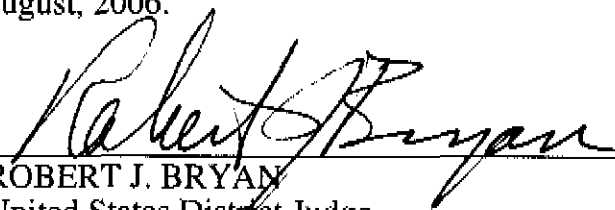
DISCUSSION

This Court dismissed the petition as time barred. Dkt. The case was therefore dismissed on procedural grounds. There is nothing in the record that would support a conclusion that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether this court was correct in its procedural ruling. The Certificate of Appealability should be denied.

Accordingly, it is hereby **ORDERED** that the Certificate of Appealability (Dkt. 31) is **DENIED**.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

DATED this 25 day of August, 2006.


ROBERT J. BRYAN
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
OFFICE OF THE CLERK
1717 Pacific Ave., Rm 3100
Tacoma, WA 98402

BRUCE RIFKIN
CLERK

JOSEPH V. WHITELEY
DEPUTY-IN-CHARGE

July 12, 2006

PAUL ANTHONY TUMA
#844317 ELKHORN C10
LARCHMONT CORRECTION CENTER
15314 NE DOLE VALLEY RD
YACOLT WA 98675

ALICE PAYNE/ALEX KOSTIN
ATTORNEY GENERAL'S OFFICE
PO BOX 40116
OLYMPIA WA 98504-0116

RE: C05-5827RJB, Tuma vs. Payne

A notice of appeal has been filed in the above captioned case. In order for the appeal to proceed, this court must first issue a certificate of appealability. See 28 U.S.C. §2253 United States v. Asrar, 116 F.3d 1268 (9th Cir. 1997). The court will construe a notice of appeal of a final order in a habeas proceeding or a proceeding under 28 U.S.C. §1155 as a petition for a certificate of appealability under 28 U.S.C. § 2253. Petitioner, therefore, does not need to file a separate petition for a certificate of appealability or take further action to place this matter on the court's calendar.

The petition for a certificate of appealability has been noted on the court's calendar for 7/28/06. Any response to the petition is due Monday, 7/24/06 and the reply, if any, is due Thursday, 7/27/06.

Sincerely,

BRUCE RIFKIN, CLERK

by /s/CM Gonzalez
Deputy Clerk

cc: file